UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION SIX

GREG'S MECHANICAL, INC.

Employer-Petitioner

and

Case 6-RM-716
(Formerly 4-RM-1236)

INTERNATIONAL BROTHERHOOD
OF ELECTRICAL WORKERS, LOCAL 743

Union

DECISION AND DIRECTION OF ELECTION

Upon a petition[1] duly filed under Section 9(c) of the National Labor Relations Act, a hearing was held before Harold Maier, a hearing officer of the National Labor Relations Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with this case to the undersigned Acting Regional Director.[2]

Upon the entire record[3] in this case, the Acting Regional Director finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

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[1] The Petition in this matter was duly filed in Region Four of the Board and captioned as Case 4-RM-1236. Following the close of the hearing in this matter, the General Counsel, by Order dated November 5, 1999, transferred this case, now captioned as Case 6-RM-716, to Region Six of the Board for, inter alia, the preparation of the Decision in this matter. The Order further provides that upon issuance of the Decision, to the extent that further processing is appropriate to effectuate the issued Decision, the case will automatically transfer back and continue in Region Four as Case 4-RM-1236.

[2] Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 l4th Street, N.W., Washington, D.C. 20570-000l. This request must be received by the Board in Washington by December 14, 1999.

[3] The Employer-Petitioner and the Union filed timely briefs in this matter which have been duly considered by the undersigned.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The labor organization involved claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(l) and Section 2(6) and (7) of the Act.

As amended at the hearing, the petition which was filed by the Employer, seeks an election in a unit composed of all full-time and regular part-time electricians employed by the Employer at its 328 Buttonwood Street, Reading, Pennsylvania, facility; excluding office clerical employees, guards, and supervisors as defined in the Act, and all other employees. The Union stipulated that the petitioned-for unit is appropriate for purposes of collective bargaining. There are currently approximately 28 employees in the petitioned-for unit.

The Union contends, contrary to the Employer, that as of the date the RM petition was filed in the instant case, a Section 9(a) relationship existed between the parties, and their collective-bargaining agreement bars the Employer from filing a petition. The Employer maintains that the parties have an 8(f) relationship; thus, the contract does not bar the instant petition.

Owner Gregory Sarangoulis, a member of the Union, formed the Employer during 1994. There is no dispute, and I find, that the Employer is an employer engaged primarily in the building and construction industry within the meaning of Section 8(f) of the Act. About the time the Employer was incorporated, the Employer was solely engaged in residential electrical work. Other than Sarangoulis, no other individuals were employed by it.

Sarangoulis testified that in July 1994, he initiated discussions with then Union Business Agent Don Siegal about signing an “agreement” with the Union so that “if I needed help, I could get somebody for help.” On July 19, 1994, based on these discussions, Sarangoulis executed a “Letter of Assent” for an Inside Agreement, which incorporates the collective-bargaining

agreement between the Union and the Reading Division, Penn-Del-Jersey Chapter of the National Electrical Contractors Association, herein called NECA. Sarangoulis testified that he was under the impression that the aforementioned Letter of Assent was a "residential agreement." In fact, it appears that, according to the practice existing between the Union and NECA, the "Inside Agreement" covers commercial work in schools, plants and other industrial facilities.[4]

The Letter of Assent provides: "The Employer agrees that if a majority of its employees authorize the Local Union to represent them in collective bargaining, the Employer will recognize the Local Union as the NLRA Section 9(a) collective bargaining agent for all employees performing electrical construction work within the jurisdiction of the Local Union on all present and future jobsites."

According to Sarangoulis, he did not review or receive a copy of the NECA collective-bargaining agreement from the Union at the time he signed the Letter of Assent.

It appears that when the 1994 Letter of Assent was executed, there were no discussions between Sarangoulis and Siegal about a "demonstration of majority support" apparently because, as noted, the Employer, at that time, did not employ any employees.[5]

The Employer became a member of NECA in 1997. Pursuant to the provisions of the 1994 Letter of Assent, wherein the Employer gave NECA the authority to act as the Employer's representative in negotiating a labor agreement between NECA and the Union, it appears that the Employer became bound to the collective-bargaining agreement entered into between these parties which is effective by its terms September 1, 1996 through August 31, 2000.

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[4] The Letter of Assent lists the various agreements existing between the Union and NECA, e.g. Inside, Outside Utility, Outside Commercial, Outside Telephone, Motor Shop Sign, Residential, Tree Trimming, etc. As noted, the Letter of Assent at issue specifically sets forth that the Employer is acknowledging that it is bound by the current and any subsequent "Inside" labor agreement between the Union and NECA.

[5] Thus, it is clear that in July 1994, the collective-bargaining relationship as it then existed between the Employer and the Union was a classic 8(f) relationship in accordance with Section 8(f) of the Act in that an agreement with a minority union was lawfully entered into by the Employer even though it was executed before the presence of a representative complement of employees.

Prior to the early summer of 1998, it does not appear that the Employer adhered to the terms of the NECA contract. Thus, the record establishes that between July 1994 to early summer 1998, the Employer did not pay the contractual wage rates or fringe benefits and, with one exception, did not deduct union dues from its employees' paychecks and remit them to the Union.[6]

During the July 1994 to early summer 1998 period, it appears that the Employer's business greatly expanded and that, in addition to residential work, it also was doing a significant amount of commercial work.

In about May 1998, Sarangoulis received a telephone call from the current Union Business Agent Randy Kieffer, who told him that he (Sarangoulis) "needed to get my men signed on the books before I (Sarangoulis) would get in trouble or he (Kieffer) would get in trouble." At this time, it appears that the Employer employed ten electricians.[7] Thereupon, according to Sarangoulis, a Union representative came to the facility, met with the employees in a group and told them, "We got to get these things signed." Sarangoulis testified further, "After that I'm not 100 percent sure if they got cards or if they filled out the cards, who handed them in and who didn't." Sarangoulis then testified that from that point in time, the Employer adhered to the contract for the following three-month period (June-August) and paid its employees the contractual wage rate, made fringe benefit contributions to the appropriate Union benefit funds, and remitted Union dues deducted from the employees' paychecks to the Union.[8]

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[6] At some point during this period, an employee by the name of Keith Sweigart was hired by the Employer. Because Sweigart was a member of the Union at the time of his hire, the Employer deducted union dues from his paycheck and remitted them to the Union.

The NECA collective-bargaining agreement does not contain a union security clause. Section 3.13 of that agreement does provide that "the employer agrees to deduct - upon receipt of a voluntary written authorization - the additional working dues from the pay of each [union] member."

[7] These employees were Dennis Beck, Christopher Weber, Ronald Smith, Kirk Seiders, Nicholas Heiner, Michael Zoorski, Mike Kissinger, Rocco Cipolla, David Eckrenroth and Sweigart.

[8] Notwithstanding Sarangoulis' testimony, the record reveals that contributions to the Union benefit funds were made only for employee David Eckrenroth in August 1998. Similarly, union dues were only remitted to the Union for Eckrenroth in August.

Despite Sarangoulis' testimony as set forth above, the record does not reveal whether the Union ever presented the Employer with a clear showing of majority support among the unit employees in the form of signed authorization cards or other documentary evidence.[9] In this regard, the Union, at the hearing in this matter, introduced authorization cards from the ten unit employees at issue, purportedly signed by them, with the dates of execution between May 12 and May 20, 1998. In addition, the Union introduced dues deduction authorization cards, again purportedly signed by the unit employees, with the same dates of execution.[10] The dues deduction authorization card provides, in part: "This authorization is voluntarily made in order to pay my fair share of the Union's cost of representing me for the purposes of collective bargaining, and this authorization is not conditioned on my present or future membership in the Union." (Emphasis supplied.)

In a letter dated August 19, 1998, from Employer attorney Stephen G. Welz to a NECA representative, the Employer resigned its membership in NECA. In separate letters dated August 26, 1998, Welz notified Union and NECA representatives that the Employer was terminating the Letter of Assent and the collective-bargaining agreement.

At some point during August 1998, the Employer's employees met with Sarangoulis and told him that they no longer wanted to be associated with the Union. Thereafter, all ten of the Employer's employees submitted letters to the Union, dated August 31, 1998, indicating that they wanted to resign their membership. After August 31, 1998, the Employer reverted to its pre-June wage rates and ceased all union dues deductions and remittances of trust fund contributions to the Union.

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[9] In this regard, neither the counsels for the respective parties nor the hearing officer asked Sarangoulis whether the Union ever proffered evidence to him purporting to establish the Union's claim of majority status. Similarly, Sarangoulis was never directly asked for the reasons the Employer began adhering to the terms of the NECA contract in the summer of 1998.

[10] The record does not reveal the exact date the representative from the Union visited the Employer's facility to "get the employees signed up." Clearly, however, all the employees did not sign authorization cards and dues deduction authorization cards on that date, since the cards were signed on various dates between May 12 and May 20.

In a letter dated September 21, 1998, the Union's attorney notified the Employer that it was the Union's position that the Employer's attempt to terminate the Letter of Assent was premature and invalid. The Union further contended that the Letter of Assent and the collective-bargaining agreement can only be effectively terminated upon notice to NECA and the Union at least 150 days prior to the anniversary date of the current approved collective-bargaining agreement.

On October 21, 1998, a representative of the Union's Joint Trust Funds gave written notice to the Employer that it was delinquent in its payments. Welz responded in a letter dated October 28, 1998, wherein he asserted that the Employer did not owe money to the Union's funds inasmuch as the Employer had resigned from NECA, had terminated its agreements with the Union, and the Employer's employees who had joined the Union had all resigned from the Union.

The Union filed a grievance over this issue and on November 16, 1998, a Labor Management Committee comprised of NECA and Union representatives found that the Employer had violated certain provisions of the collective-bargaining agreement, and ordered it to make whole the employees, the Union, and various benefit funds. After the Employer failed to comply with this determination, on June 17, 1999, the Union obtained an Order in the United States District Court for the Eastern District of Pennsylvania directing the Employer to comply with the Decision of the NECA/Union Labor Management Committee. As of the date of the hearing in this matter, the Employer had not complied with that Order.

The issue in the instant matter is whether the relationship between the Union and the Employer is based on Section 9(a) or on Section 8(f) of the Act. The second proviso to Section 8(f) states that when the majority status of the contracting union has not been established pursuant to Section 9, an agreement lawful under Section 8(f) will not serve as a bar to a petition filed pursuant to Section 9(c) or 9(e). Accordingly, a prehire contract made lawful by Section 8(f) does not constitute a bar to a petition. John Deklewa & Sons, 282 NLRB 1375 (1987). As previously indicated herein, the Union contends, contrary to the Employer, that the

parties entered into a 9(a) relationship, that the Employer's attempt to terminate the collective-bargaining agreement was invalid, and that the agreement serves as a contract bar to the Employer's instant RM petition. The Employer contends that the parties entered into an 8(f) contract in 1994, and that the Employer has not taken the necessary steps to confer 9(a) status on the Union. Thus, the Employer argues, the collective-bargaining agreement does not serve as a bar to the RM petition in the instant case.

In John Deklewa & Sons, supra, the Board stated that it would presume that parties in the construction industry intend their relationship to be an 8(f) relationship, and that the party asserting a 9(a) relationship in the construction industry has the burden of proving that such a relationship exists. 282 NLRB at 1385 fn. 41. See also Casale Industries, 311 NLRB 951, 952 (1993). In Deklewa, the Board further held that this burden could be met by showing that a construction industry employer voluntarily recognized a union based on a clear showing of majority support among the unit employees, e.g., a valid card majority. 282 NLRB at 1387 fn. 53. See also Pierson Electric, Incorporated d/b/a Golden West Electric, 307 NLRB 1494, 1495 (1992).

Under Board law, regardless of whether the contract in dispute is an initial or successive collective-bargaining agreement, absent a Board conducted election, the Board will require positive evidence that the union sought and the employer extended recognition to a union as the 9(a) representative of its employees before concluding that the relationship between the parties is 9(a) and not 8(f). J & R Tile, Inc., 291 NLRB 1034, 1036 (1988).

In the instant case, the Union contends that it attained 9(a) status by virtue of the terms of the Letter of Assent signed by the Employer during 1994, and the terms of the collective-bargaining agreement. The Union cites Section 2.06 of the agreement in support of its position. This section provides, in part, that "[t]he Employer recognizes the Union as the sole and exclusive representative of *all* its employees performing work within the jurisdiction of the Union for the purpose of collective bargaining in respect to rates of pay, wages, hours of employment

and other conditions of employment." The Union further contends that it supplied the Employer with proof of its majority support at some point prior to the expiration of the Letter of Assent.

In support of its position, the Union cites the Board's decisions in Goodless Electric Co., Inc., 321 NLRB 64 (1996); Triple A Fire Protection, Inc., 312 NLRB 1088 (1993); and Oklahoma Installation Company, 325 NLRB 741 (1998). In Goodless Electric, the employer executed a Letter of Assent with future recognition language similar to that in the instant case. Unlike the parties in the instant case, in Goodless Electric, the union satisfied the second prong of the Board's requirement for 9(a) status when it presented the employer with signed authorization cards from the majority of employees, during contract negotiations subsequent to the signing of the letter of assent, which the employer independently verified. The Board found that the employer's execution of the letter of assent, coupled with the showing of majority status prior to the expiration of the letter, established a 9(a) relationship between the parties. 321 NLRB at 64-66.

In Oklahoma Installation Company, the employer executed a recognition agreement and letter of assent with the union. The recognition agreement therein contained language indicating that the union had submitted, and the employer was satisfied that the union represented a majority of its employees in a unit that was appropriate for collective bargaining. The Board found that the above-mentioned language in the recognition agreement was sufficient proof of the union's unequivocal demand for 9(a) recognition and the employer's voluntary acceptance of that demand, and that an additional showing of majority support, such as authorization cards, was not necessary for a finding of 9(a) status. 325 NLRB at 741-742.

I find the facts of the instant case distinguishable from the facts in Oklahoma Installation Company. In that case, the recognition agreement and letter of assent sufficiently proved that the union submitted an unequivocal demand for Section 9(a) recognition and a satisfactory showing that it represented a majority of the unit employees for collective bargaining, and that the employer accepted the demand on this basis. In the instant case, the collective-bargaining agreement does not contain language providing for such an unequivocal demand and for the

Employer's acceptance of the union's majority showing. Moreover, the letter of assent executed by the Employer, which, as noted above, is identical to the letter of assent involved in Goodless Electric, only constituted a continuing demand for 9(a) recognition and a continuing enforceable promise by the Employer to grant such recognition if the Union demonstrated majority support. Based on the record evidence and Board precedent, I find that the language in the parties' collective-bargaining agreement and letter of assent is insufficient by itself to confer 9(a) status on the parties' relationship.

In its post-hearing brief, the Union argues, in the alternative, that assuming the letter of assent merely provides for an "open demand," the Union then was obligated only to "show at some time prior to the expiration of the letter of assent that it has achieved majority status" in order to support its claim that it achieved 9(a) representative status, and that the Employer did not need "to accept or acknowledge the showing of majority support" for 9(a) status to be achieved. Thus, the Union argues that it was not required to proffer to the Employer an affirmative showing of majority support in the form of authorization cards or other documentary evidence, but only to establish that it had in its possession at a relevant period of time signed authorization cards from a majority of the unit employees. Further, the Union implies that the Employer must have known the Union had majority support since it began adhering to the contract, made the required fringe benefit payments to the Union funds as reflected by the June-August fringe benefit reports, and deducted and remitted union dues for its employees during this same period.

In support of its argument that it obtained, in the circumstances set forth above, 9(a) status, the Union relies on the Board decision in Triple A Fire Protection, Inc., supra. The Board's Decision in Triple A Fire Protection, Inc., however, is factually distinguishable from the case at bar. In that case, the record established that the union made an unequivocal demand for recognition as the 9(a) representative of the employer's unit employees and contemporaneously proffered to the employer documentary evidence which was purported to support the union's claim of majority status. That evidence consisted of a fringe benefit report

which reflected that a majority of the employer's unit employees were then members of the union when the union's demand and proffer of documentary evidence of majority status was made. The union also presented the employer with a written acknowledgement, which the employer signed, confirming that the union, based upon a showing of majority support, was the exclusive representative of the unit employees pursuant to Section 9(a) of the Act. In these circumstances, the Board found that it was clear the parties intended to establish a Section 9(a) relationship.

Again, the Board has consistently held since Deklewa that in light of the legislative history and the traditional prevailing practice in the construction industry, the Board will require the party asserting the existence of a 9(a) relationship to prove it either through a Board-conducted election or through voluntary recognition based upon a prior claim and a clear showing of majority support among employees in an appropriate unit. E.g., McLean County Roofing, 290 NLRB 685, 686 fn. 4 (1988); Meekins, Inc., 290 NLRB 126 (1988); J&R Tile, supra. In J&R Tile, the Board specifically held that the fact that employees are union members, or that an employer has personal knowledge of its employees' union membership, is not dispositive of the status of the collective-bargaining agreement. Further, the Board in that case stated that even when union membership is voluntary and not imposed by a prior 8(f) contract, a 9(a) relationship is not established in the absence of an affirmative showing that the employer designated the union as the 9(a) representative. J&R Tile, supra, at 1037.[11] Similarly, where a union and an employer enter into an agreement which contains a union security clause requiring all employees to be, or become, union members, and the contract is entered into without regard to whether the union had the support of a majority of the employees, the contract remains an 8(f) contract absent evidence of a demand for, and a grant of, voluntary recognition based upon

[11] In J&R Tile, the employer at issue was a successor employer to a predecessor who entered into an 8(f) agreement with the union. The union representative in that case informed the successor that the predecessor's unit employees belonged to the union. The union representative, however, did not produce any union authorization cards or offer to substantiate his claim in any manner. The Board held that 9(a) status had not been achieved by the union in the circumstances presented.

a showing of majority support among the unit employees. American Thoro Clean, Ltd., 283 NLRB 1107, 1108 (1987).

Further, in McLean County Roofing, supra, the Board, relying on Deklewa, reversed an administrative law judge's conclusion that a 9(a) relationship was established due to the existence of a permanent and stable workforce made up of employees the majority of whom financially supported the union with their dues and for whom the employer made regular pension deductions.

In summary, it is clear that for a union to achieve 9(a) status in the representation of unit employees of a construction industry employer, there must be evidence of an affirmative manifestation of intent by the employer to voluntarily recognize the union as the 9(a) representative based upon a demonstration of majority status. Accord, Triple A Fire Protection, Inc., supra. In the instant case, I conclude that the Union did not achieve 9(a) status in the representation of the Employer's employees. First, there is no evidence or contention that the Union, in May 1998, proffered documentary evidence in the form of authorization cards or dues checkoff authorization cards to the Employer to demonstrate the Union's majority support, or that the dues checkoff authorization cards purportedly signed by the unit employees were ever submitted to the Employer. Second, Sarangoulis' vague testimony and his failure to explain the bases for his decision to adhere to the NECA contract by paying the contractual wage rates, making fringe benefit contributions to the Union funds, and deducting dues from the employees' pay and remitting them to the Union, does not establish an affirmative manifestation on the Employer's behalf to recognize the Union as the 9(a) representative of its employees. Rather, Sarangoulis' testimony at best establishes that in his mind he "thought" the employees "signed" with the Union. Moreover, it is clear that on the date the Union visited the Employer's facility to "sign up" the employees, most of the employees did not sign authorization cards at that time.[12]

[12] The earliest date any of the authorization cards were signed is May 12, 1998. Only two of nine employees signed authorization cards on that date. A third employee, Keith Sweigart, was already, as noted, a Union member in May 1998.

Clearly, Sarangoulis' testimony does not satisfy the burden set out in Deklewa to establish a 9(a) relationship. Finally, I cannot conclude, based upon the case law discussed above, that 9(a) status was achieved by operation of the language set forth in the parties' letter of assent once the Union obtained authorization cards from a majority of the employees. This language does not extinguish the Union's obligation to affirmatively proffer to the Employer its evidence of majority status under the principles set forth in Deklewa and its progeny.

Consequently, in the absence of any affirmative showing by the Union to the Employer of majority status, I find that the relationship between the Employer and the Union is an 8(f) relationship.[13] An employer may file an RM petition at any time during the term of an 8(f) contract and, therefore, the contract between the Employer and the Union does not operate to bar the instant petition. John Deklewa and Sons, supra.

Accordingly, I find that the following employees of the Employer constitute an appropriate unit for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time electricians employed by the Employer out of its 328 Buttonwood Street, Reading, Pennsylvania, facility; excluding office clerical employees and guards, professional employees and supervisors as defined in the Act, and all other employees.

DIRECTION OF ELECTION

An election by secret ballot will be conducted by the Regional Director for Region Four among the employees in the unit set forth above at the time and place set forth in the Notice of Election to be issued subsequently, subject to the Board's Rules and Regulations.[14] Eligible to

[13] I note that the petition herein was filed beyond the three-year period during which the contract between the parties would have barred a properly supported petition. However, in view of my finding herein that the parties' relationship was an 8(f) relationship, I do not reach the Employer's alternative arguments predicated upon a finding that the Union enjoyed Section 9(a) status.

[14] Pursuant to Section l03.20 of the Board's Rules and Regulations, official Notices of Election shall be posted by the Employer in conspicuous places at least 3 full working days prior to l2:01 a.m. of the day of the election. As soon as the election arrangements are finalized, the Employer will be informed when the Notices must be posted in order to comply with the posting requirement. Failure to post the Election

vote are those employees in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were ill, on vacation or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period and employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.[15] Those eligible shall vote whether

Notices as required shall be grounds for setting aside the election whenever proper and timely objections are filed.

[15] In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. Excelsior Underwear, Inc. 156 NLRB 1236 (l966); NLRB v. Wyman-Gordon Company, 394 U.S. 759 (l969). Accordingly, it is hereby directed that the election eligibility list, containing the full names and addresses of all eligible voters, must be filed by the Employer with the Regional Director of Region Four within seven (7) days of the date of this Decision and Direction of Election. The Regional Director of Region Four shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the Regional Office of Region Four, 615 Chestnut Street, 7th Floor, Philadelphia, PA 19106-4404, on or before December 7, 1999. No extension of time to file this list may be granted, except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

or not they desire to be represented for collective bargaining by International Brotherhood of Electrical Workers, Local 743.

Dated at Pittsburgh, Pennsylvania, this 30th day of November 1999.

/s/ Michael C. Joyce
Michael C. Joyce
Acting Regional Director, Region Six

NATIONAL LABOR RELATIONS BOARD
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